IN THE

Supreme Court of the United States

OCTOBER TERM—1945

No. 1

THE NORTH AMERICAN COMPANY,
Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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Nov. 5, 1945.

CASES CITED

STATUTORY PROVISIONS CITED

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Respondent herein, in its brief in the *Engineers Public Service Company* cases (Nos. 2 and 3, October Term, 1945) refers to recent decisions, and makes additional argument, which it deems pertinent to the issue under the Commerce Clause, in view of the fact that the briefs herein were filed two and one-half years ago (Resp. Br. in Nos. 2 and 3, pp. 5, 33-42).

The purpose of this supplemental brief is similarly to bring up to date the brief and reply brief of petitioners herein.

Discussion of the Commerce Clause cases decided by this Court since the briefs herein were written may start with the insurance cases, *United States* v. *Southeastern*

Underwriters Association, 322 U. S. 533, and *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643, decided the same day, one under the Sherman Anti-Trust Law and the other under the National Labor Relations Act.

The *Southeastern Underwriters* case was an appeal from a dismissal of an indictment which charged restraint of interstate trade and commerce by the fixing and maintaining of arbitrary and non-competitive premium rates on certain lines of insurance and monopolizing trade and commerce in such insurance. The indictment charged, among other things, that by continuing agreement and concert of action the conspirators not only fixed premiums, but employed boycotts and other types of coercion and intimidation to force non-member insurance companies to join the conspiracy, and to compel persons who needed insurance to buy only from members of the Association on terms fixed by the Association; persons who purchased insurance from non-members were threatened with boycotts and withdrawal of patronage. Non-members were cut off from opportunity to reinsure their risks, and agents who represented non-members were denied the right to represent member insurance companies. The conspiracies were effectively policed by local inspection and rating bureaus and by local boards of insurance agents. This "kind of interference with the free play of competitive forces" was, as the majority opinion said (322 U. S. p. 536), "exactly the type of conduct which the Sherman Act has outlawed for American 'trade or commerce' among the states". The demurrer was on the ground that because "the business of fire insurance is not commerce" appellees were not required to conform to the Sherman Act (*ibid.*).

The essential basis of this Court's decision was its interpretation of the decision of the District Court. The majority opinion carefully differentiates between the activities alleged in the indictment and the insurance contracts as such. It said (322 U. S. p. 536-537) that the District Court's opinion contained not the slightest intimation that the indictment was held defective "on a theory that it charged the appellees with restraining and monopolizing nothing but the making of local contracts"; that there was not even a demurrer on that ground. It pointed out (*id.* p. 548) that "for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation". And the conclusion of the part of the opinion dealing with the constitutional question was as follows (*id.* p. 553):

> "No commercial enterprise of any kind which conducts its activities across state lines has been held to be *wholly** beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance."

The Sherman Act falls within the first category of instances of Congressional regulation enumerated in *United States* v. *Darby*, 312 U. S. 100, 120-121 (quoted in our Main Brief pp. 12-13), where the Congress has left it to the courts to determine whether the activities sought to be regulated or proscribed affect interstate commerce. In the *Southeastern Underwriters* case, the court had before it activities which presumptively would have such effect, un-

*All italics in quotations in this brief are supplied unless otherwise noted.

less it were prepared to hold that *no* part of the activities of insurance companies, as distinguished from the mere writing of insurance contracts, could ever under any circumstances restrain interstate commerce. This Court was unwilling to establish a rule which would foreclose inquiry by the courts on that subject. But the case is far from holding that all aspects of the insurance business are "in commerce" or even "affect" commerce.

The distinction between what is "in" and what merely "affects" commerce is sharply brought out by this Court's decision in the other insurance case, *Polish National Alliance* v. *National Labor Relations Board*, *supra*, where regulation of labor practices of an insurance company was upheld under the National Labor Relations Act. That Act, this Court said, exerted the full constitutional power of Congress, and hence the judicial inquiry was whether constitutional limits had been exceeded (322 U. S., pp. 648, 650). The Labor Board had made two findings, one that the company was "engaged *in commerce* within the meaning of the Act", and the other that its practices "have a close, intimate, and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce" (*id.* pp. 651, 646). The majority opinion in this Court grounded its decision that the regulation was valid solely on the latter finding. Its conclusion (*id.*, p. 648) was "that the Board was not unjustified in finding that the unfair labor practices found by it would *affect* commerce". The concurring opinion of a minority of the Court insisted that the regulation of petitioner's labor practices should not be placed upon the ground "that petitioner's insurance activities merely *affected* commerce in types of interstate business other than its own" (*id.*, p. 651). But it is obvious from the limited ground

upon which the majority rested its decision that it was unwilling to accept that view.

The recent insurance cases therefore tend strongly to confirm the premise of the argument in our main brief and reply brief that, contrary to respondent's contention, a public utility holding company's ownership of stocks, which is all that Section 11(b)(1) deals with, is not of itself commerce; and that an enactment proscribing such ownership of property may not be upheld as an exercise of the commerce power unless it falls within the rule that even things that are local, or not commerce, may still be reached by Congress if they so affect interstate commerce, or the exertion of the power of Congress over it, "as to make regulation of them *appropriate means* to the attaining of a *legitimate end*, the *effective execution of the granted power* to regulate interstate commerce" (*United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 119).

The only argument, having even superficial appearance of foundation, upon which respondent based its contention that the ownership of public utility stocks by holding companies generally, and North American specifically, is itself commerce, is attempted identification of the holding company with the activities of such of its subsidiaries as are engaged in interstate commerce, in the case of North American about one-half thereof. Respondent grounds that contention on the theory that a holding company, and North American specifically, "controls its subsidiaries and that their acts are its acts" (Resp. Br. in this case, p. 27). We answered that contention in our reply brief, pp. 3-13, and particularly the argument that Sections 2(a)(7) and 2(a)(8), defining "holding company" and "subsidiary company" respectively, prescribe the "test of control". We showed that the test applied by those sections was not that of "control",

in the sense used by respondent, but included criteria, such for example as "controlling influence", which can be and has been found on facts which gave no indication that the acts of the subsidiary could legitimately be deemed those of the holding company. Among the cases discussed in that connection (*id.*, pp. 8-10)* was one, *Pacific Gas & Electric Co.* v. *Securities and Exchange Commission*, 127 F. (2d) 378 (C. C. A. 9), involving a company in the North American system, in which further judicial proceedings have been had since the briefs herein were written.

The petition which was denied in 127 F. (2d) 378 was one by the Pacific Gas & Electric Company to review an order of the Securities and Exchange Commission which denied the company's application for a declaration that it was not a subsidiary of North American. There was thereafter a rehearing by the Circuit Court of Appeals *en banc* (139 F. (2d) 298). The result was an affirmance of the order by an equally divided court. A writ of certiorari was granted by this Court, which affirmed, also by an equally divided court (323 U. S. 826). The only opinion in these subsequent proceedings is the dissenting opinion in the Circuit Court of Appeals. We call attention to it for its elaborate and valuable recital of the facts, as to which there was no dispute. Those facts clearly demonstrated absence of "control", in spite of which the company was held to be under a "controlling influence" of North American within the meaning of the Act, and hence a subsidiary. (See particularly 139 F. (2d) pp. 302-303, 306-307).

*The case of *American Gas & Electric Company* v. *Securities and Exchange Commission*, cited at p. 10 of the reply brief, has since been officially reported, the citation being 134 F. (2d) 633 (C. C. A., D. C.).

In the instant case the Circuit Court of Appeals found (R., Vol. X, 4001) that the business of North American "consists in acquiring and holding for investment stocks and other securities, principally in the electric utility field" and that "at no time has it engaged in the business of managing the operations of its public utility operating subsidiaries". That was consistent with the Commission's finding (R., Vol. I, 100-101, referred to in our Reply Br., p. 4) that "as nearly as can be determined from the record in this case, North American leaves operations and operational policy to the management of its subsidiaries".

In the *Polish National Alliance* case, *supra*, the minority concurring opinion itself recognizes (322 U. S. p. 652) that, in applying the doctrine permitting regulation of activities "not themselves interstate commerce, but merely 'affecting' such commerce" this Court "properly has been cautious, and has required *clear findings* before subjecting local business to paramount Federal regulation".

Under the Sherman Act the finding is made by the Court itself. Under the National Labor Relations Act the finding is made by the administrative agency, subject to review by the Court. Concededly Section 11(b)(1) of the Public Utility Holding Company Act falls within neither of these categories, because there is no provision for a finding by court or administrative body of any effect on interstate commerce resulting from the holding companies' stock ownerships. The only contention possible to support the validity of Section 11(b)(1) is that it falls within the third category of the *Darby* case where "Congress itself has said that a particular activity affects the commerce". We shall not repeat the argument against the soundness of that contention which we advance in our Main Brief, pp. 26-35, and our reply Brief, pp. 18-27. Even the most hopeful

reading of Section 1 of the Act will not disclose any finding —much less a "clear finding"—that ownership by holding companies of the securities of operating companies affects interstate commerce adversely or at all.

It was peculiarly necessary for the validity of legislation of this sort, which did not itself even purport to establish a "rule by which *commerce* is to be governed," that provision be made for a finding by some body, judicial or administrative, that such stock ownership on the part of the company sought to be subjected to the requirements of Section 11(b)(1) had the necessary effect upon interstate commerce. The figures presented by respondent itself (its brief in this case, p. 5) are that only 19.8% of the electric power production for December, 1941, was in interstate movement. Granted that the operations of an intrastate utility company may affect interstate commerce, as for example if it supplies current to interstate carriers, the existence of that fact would have to be found. And facts in addition to that would also have to be found before a conclusion could be justified that the ownership by a holding company of 10% of the stock of an operating company, whether intrastate or interstate, so affected interstate commerce.

In this general connection a new argument is advanced by respondent in its brief in the *Engineers Public Service Company* cases (Nos. 2 and 3), p. 36, based on the separability provision in Section 32 of the Act that

> "If any provision of this title or the application of such provision to any person or circumstances shall be held invalid, the remainder of the title and the application of such provision to persons or circum-

stances other than those as to which it is held invalid shall not be affected thereby."

The argument is (*id.* p. 35) that, even if it be assumed that under some circumstances some company might be subjected to Section 11 whose connection with interstate commerce was too remote to support constitutional power, the only result would be to render the Act invalid as applied to that particular company.

The argument is unsound. A statute which strikes indiscriminately at those who are beyond as well as those who are within the reach of federal power is invalid on its face. It is not permissible to construe it as if the Congress had inserted limiting words that actually are not there. (*United States* v. *Reese*, 92 U. S. 214, 221). The fact that the statute contains a separability clause in the exact language of Section 32 here in question does not change the rule. (*Hill* v. *Wallace*, 259 U. S. 44, 70; *Retirement Board* v. *Alton Railroad Company*, 295 U. S. 330, 362).

While the respondent did not in its brief in this case make a contention corresponding to that which it now advances in Nos. 2 and 3 under the separability provision of Section 32, it did make (p. 24) a related contention which it may seek in oral argument to correlate with Section 32. In connection with the effect of the exemption clause of Section 3(a), it relies on a "policy set forth in Section 1(c) of the Act" which it says is "the policy which the Commission is required to apply in considering exceptions to Section 3(a) exemptions".* The clause cited is:

> "* * * It is hereby declared to be the policy of this title, *in accordance with which policy all the provi-*

*For our argument on Section 3(a), see our main brief, pp. 21-24.

> *sions of this title shall be interpreted*, to meet the problems and eliminate the evils as enumerated in this section connected with public utility holding companies which are *engaged in interstate commerce or in activities which directly affect or burden interstate commerce;* * * *".
> (Italics the respondent's)

We pointed out in our reply brief (p. 6) that this general declaration in Section 1(c) did not limit the application of Section 11(b)(1) to only those public utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce. The provisions of Section 11(b)(1) are so explicit that, even if the above-quoted clause of the declaration stood alone, it could have no effect in limiting them.

We now add that the above-quoted clause, on which respondent relies, does not stand alone. Respondent omits to quote the final clause of Section 1(c) which immediately follows it and which reads:

> "and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practical for the elimination of public-utility holding companies except as otherwise expressly provided in this title."

That contains no qualification based on the relation of the holding companies to interstate commerce, and, since it immediately follows a clause which does the omission is clearly intentional. Its declared purpose to eliminate from holding company systems properties deemed detrimental,

whether or not for reasons related to their effect on interstate commerce, and the elimination of holding companies themselves "except as otherwise expressly provided in this *title*", is consistent with the terms of Section 11(b)(1). Obviously the preceding clause, on which respondent relies, relating to the elimination, not of public utility holding companies *per se*, but of "the evils" connected with those "which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce", refers to the regulatory provisions of the Act.

The recent authority chiefly relied on by respondent is *Borden Co.* v. *Borella*, No. 688, October Term, 1944, 89 L. Ed. 1240, a case under the Fair Labor Standards Act, in which porters, elevator operators and night watchmen in a building owned and operated by the Borden Company, which was admittedly engaged in interstate commerce, were held to be within the minimum wage and overtime provisions of that Act as "employees engaged in commerce or in the production of goods for commerce" within the statutory definition. But on the same day this Court in *10 East 40th Street Building, Inc.*, v. *Callus*, No. 820, 89 L. Ed. 1244, held the other way where the building in question was not owned and operated as the headquarters of an interstate-commerce business and predominantly occupied for its offices, but had a miscellaneous assortment of tenants, some engaged and some not engaged in interstate commerce; the fact that nearly half of both the rentable and rented area was occupied by manufacturing and other concerns engaged in the production of goods for interstate commerce was not deemed sufficient to bring the maintenance employees therein within the purview of the Fair Labor Standards Act.

It seems to us that, as between these decisions under the Fair Labor Standards Act, it is the *10 East 40th Street Building* case rather than the *Borden Company* case which is apposite to this one. We are here considering the validity of an attempt to bring petitioner within the reach of the commerce power solely because of its ownership of the stocks of other corporations and the incidental interstate communications which are normal to investors. The businesses of the corporations in the North American system were as miscellaneous, both with respect to their inherent character and their relation to interstate commerce, as were those of the tenants of 10 East 40th Street. They comprised electric utility companies, some interstate and some intrastate, gas utility companies, some interstate and some intrastate, and in addition companies engaged in steam and hot water heating, water supply, railroad, urban and interurban transportation, terminal warehousing, real estate, coal mining, ice manufacturing and distribution, trucking, parking lot and filling station operation, motor servicing, heavy appliance design and manufacture, amusement park operation, investment company, oil drilling and gasoline extracting (Resp. Br. in this case p. 13, citing R., Vol. I, 84). This Court said in the *10 East 40th Street Building* case (p. 1247) that

> "Renting office space in a building exclusively set aside for an unrestricted variety of office work spontaneously satisfies the common understanding of what is local business * * *".

So, we submit, the mere ownership of stocks in such a miscellany of enterprises (which may be, and often is, duplicated in the case of individuals of large and diverse interests) occasions an identical spontaneous reaction.

In our view, decisions under the Fair Labor Standards Act are helpful analogies on the constitutional question. It is true that the test under that Act is not in all respects co-extensive with the constitutional test. But both involve the difficult problem of drawing lines where there are no fixed points. *See Kirschbaum* v. *Wailing*, 316 U. S. 517, 523. And in both, the precise place at which the line should be drawn cannot be determined solely by logical deductions but must pay due regard to necessary accommodation between state and national authority. This Court said in the *10 East 40th Street Building* case (89 L. ed. p. 1248) that on all border-line factual situations involved under the Fair Labor Standards Act an argument can be made on either side and that the correct solution is "a question of degree". Almost the identical phrase was used by this Court with respect to the "great concepts of the Constitution such as 'interstate commerce'"; that, since "mathematical or rigid formulas" are not therein provided, "the criterion is necessarily one of degree" (*Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453, 467); and that "however difficult in application" differentiation "is essential to the maintenance of our constitutional system" (*id.* p. 466).

The complexity of modern economic enterprise is such that, if the distinction between local and interstate business were made to rest solely on logical pursuit of causative effects, there would be few activities which could not be drawn within the ambit of the statutory test or the constitutional test. But neither the statutory nor the constitutional concept is so applied by this Court. Realization that our government is not a unitary but a federal one infuses all of its opinions in commerce cases whether they relate to

statutory or constitutional interpretation. On the statutory question, see *McLeod* v. *Threlkeld*, 319 U. S. 491, holding that a cook employed to prepare and serve meals to maintenance-of-way employees of an interstate railroad, in pursuance of a contract between his employer and the railroad company, is not "engaged in commerce" within the meaning of the Fair Labor Standards Act, although recognizing (pp. 493-494) that the quoted phrase "covered every employee in the 'channels of interstate commerce', *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 * * *". On the constitutional question, see the following passage of this Court's opinion in *Polish National Alliance* v. *National Labor Relations Board* (322 U. S. p. 650):

> "The interpenetrations of modern society have not wiped out state lines. It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity. * * *"

Respectfully submitted,

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